
(1964) 09 AHC CK 0009

In the Allahabad High Court

Case No : Civil Miscellaneous Writ No. 3303 of 1964

BANSAL AND CO.

APPELLANT

Vs

Income Tax OFFICER, D-WARD, AGRA, AND ANOTHER.

RESPONDENT

Date of Decision : 30-09-1964

Acts Referred:

Constitution of India, 1950 — Article 226

Income Tax Act, 1961 — Section 222, 223, 224, 225, 226

Citation : (1966) 62 ITR 402

Judgement

This is a writ petition under article 226 of the Constitution by Messrs. Bansal & Co., a registered firm carrying on business of timber at Agra, and is directed against the proceedings taken under the provisions of section 226 read with sections 222 to 224 of the Income Tax Act of 1961 (hereinafter referred to as the Act). The relief claimed is for a declaration that the proceedings for recovery of tax are illegal and for the quashing of the certificate of recovery and the warrant of attachment.

The facts leading up to the petition are somewhat disputed but the facts which can be said to be admitted are these :

A firm, Shankar Lal Ram Prakash, Bullion Merchants, Agra, hereinafter referred to as the assessee, owed a sum of Rs. 8,439,79 on account of the demand of Income Tax. The assessee claimed that their father, Sri Shankar Lal, was the karta of the Hindu undivided family, which was carrying on sarafa business at Agra under the name and style of Messrs. Jwala Prasad Shankar Lal that their late father had deposited with the petitioner in the name of Shankar Lal Ram Prakash the sum of Rs. 18,000 out of the funds of the Hindu undivided family as investments on various hundis at the rate of 1% per mensem that on October 17, 1963, the balance remaining with the said Bansal & Co. was Rs. 12,000 and out of this a sum of Rs. 2,000 was paid by the petitioner by cheque No. 00495 dated the 7th October, 1963, favouring Messrs. Shankar Lal Ram Prakash and for the balance of Rs. 10,000 the deponent held two hundis of the said Bansal & Co. both dated August 15, 1963. The cheque of Rs. 2,000 and one of the Hundis was

not honoured. Further, that a few months earlier the petitioners in their own assessment proceedings before the Income Tax Officer, C-Ward, Agra, when required to prove the nature and source of the sum of Rs. 18,000 deposited with them by the assessee had admitted that the amount belonged to the Hindu undivided family consisting of the deponents and had produced Ram Prakash, the karta of the Hindu undivided family, in support of their said claim.

On the 19th October, 1963, the Income Tax Officer issued a notice u/s 226(3) of the Act (corresponding to section 46(5A) of the Act of 1922) to the petitioner stating that the sum of Rs. 8,429.29 out of the sum of Rs. 12,000 alleged to be due from the petitioner to Shankar Lal Ram Prakash should not be paid to them but to the Income Tax Officer. On the 7th November, 1963, the Income Tax Officer issued a reminder u/s 226(3) of the Act but at the same time extending the period of compliance therewith to the 18th of November, 1963. The petitioner, however, in the meantime had already, a day earlier on the 8th November, 1963, replied to the notice dated the 19th October, 1963. It was stated that the present credit balance in the books of account of the petitioner in the account of Shankar Lal Ram Prakash was only Rs. 2,000 and not Rs. 8,430, that as ordered the petitioner would not pay it to the aforesaid creditor but the payment would be made to the Income Tax Officer. The petitioner, however, added a rider that the payments required to be made u/s 226(3) would be made gradually, as at the present moment the petitioner was only liable to pay Rs. 2,000 to the creditor. This reply to the notice was not accompanied by an affidavit or any statement on oath. The petitioner, however, in the petition has alleged that he had made this denial on oath before the Income Tax Officer but the latter did not record the same in proof of his denial. This statement is denied by the Income Tax Officer upon an affidavit but this paragraph is verified not from personal knowledge but only from a perusal of the record. Prima facie, this question becomes a disputed question of fact and it will again be adverted to hereinafter.

Though time had only been extended up to the 18th November, 1963, for compliance with the order u/s 226(3), the petitioner on the 20th November, 1963, reiterated that he was prepared to pay Rs. 2,000 in instalments. Again this application was not accompanied by an affidavit. The Income Tax Officer on the 20th November, 1963, called on the petitioner to appear and produce his books of account on the 25th November, 1963, for verification as to the credit balance in favour of the assessee. Apparently, no books of account were produced and by a notice dated the 6th of December, 1963, the petitioner was asked to produce the books on the 13th December, 1963. On the 13th December, 1963, again there was no compliance and after waiting for a month, on the 13th January, 1964, the Income Tax Officer, deeming the petitioner to be an assessee in default under the provisions of section 226(3), forwarded the certificate of recovery to the Tax Recovery Officer in exercise of his power u/s 222 of the Act for recovery as if it were an arrears of tax due from him.

On the 25th January, 1964, the Naib Tehsildar, who was the Tax Recovery Officer (hereinafter referred to as the Tax Recovery Officer), admittedly, contacted the petitioners for compliance with the Recovery certificate. This is clear from an application made to the Tax Recovery Officer on that very day by the petitioners, which is annexure "CA-1" to the counter-affidavit of the Naib Tehsildar. In this application it was stated that the Tehsildar had to take recovery proceedings but these proceedings should be stayed till the 30th January, 1964, by which date they would produce a stay order from the Income Tax Officer. No stay order however was produced but an application was moved before the Income Tax Officer on the 18th March, 1964 (Annexure "CA-II" to the counter-affidavit) which was for the first time headed as an objection filed u/s 226(3)(vi) of the Act. In that application it was stated that an objection was being filed accompanied by a statement on oath that the sum demanded or any part thereof was not due from them to the assessee. There is significantly no mention in this application of any statement on oath having been made earlier but which was not recorded by the Income Tax Officer. The Income Tax Officer appears not to have entertained this application as the stage for filing an objection under the provisions of section 226 had already passed when the recovery certificate was issued to the Tax Recovery Officer but it was looked into merely for the purpose of satisfying himself as to whether any amount was due and whether u/s 224(2) the recovery certificate was required to be withdrawn or corrected.

On the 18th March, 1964, the Tax Recovery Officer was also moved to stay the proceedings in view of the application moved before the Income Tax Officer dated the 16th March, 1964. The application was rejected on the 30th March, 1964, by the Tax Recovery Officer. On the 2nd of April, 1964, the kurk amin went to the petitioner, with the warrant of attachment, which is annexure "J" to the petition, which recited that as the sum of Rs. 8,442.79 had not been paid in satisfaction of the certificate issued against the petitioner, he was directed to serve a copy of this warrant on the defaulter and if the said sum was not paid forthwith, the kurk amin should proceed to attach the movable property of the said defaulter. On that very day, the petitioner issued a cheque in full satisfaction of the recovery proceedings. The payment of that cheque, however, was stopped on the next day on the ground that the cheque had been issued under a mistake of fact.

On the 6th of June, 1964, another warrant of attachment was issued which is the one impugned in these proceedings. The actual attachment of the movables was made on the 24th June, 1964. The present writ petition was filed on the 18th July, 1964. The petition was not supported by an affidavit on personal knowledge, as required by rule 1, sub-clause (2) of Chapter XXII, Volume I of the Rules of this court. The affidavit accompanying was only that of a pairokar and the verification except of paragraph 1, which was only a formal paragraph, was on information received from the petitioner or based on the record which the petitioner believed to be true.

The questions that fall to be considered in this petition are :

"(1) Whether the petition was properly presented in view of the affidavit not having been sworn by the petitioner himself or by his pairakar from personal knowledge ?

(2) Whether the provisions of section 226, clause (3) (vi), had been complied with and, if not, its effect ?

(3) If the provisions of section 226(3)(vi) were not complied with and the Income Tax Officer has issued a recovery certificate under the provisions of section 226(3)(x), is the Income Tax Officer upon an affidavit being filed subsequent thereto bound to act under the provisions of section 226(3)(vi) or is such affidavit only to be taken into consideration for purposes of withdrawing or correcting the recovery certificate under the provisions of section 224(2) of the Act ?

(4) Whether the provisions of rule 2 of Schedule II of the Act were complied with and, if not complied with, whether it amounted only to a procedural defect which would not vitiate the recovery proceedings ?

(5) Whether there is an adequate alternate remedy available to the petitioner ?"

On the first question, there would appear to have been no proper compliance of rule 1(ii) of Chapter 22 of the Rules of this court. This rule lays down that such affidavit shall be restricted to facts which are in the deponents own knowledge. Therefore, on this short ground alone, the petition would require to be dismissed, as the decision in a writ petition necessarily rests on the facts stated upon affidavit, and, if the affidavit filed is not of any value, it cannot constitute any foundation for invoking the writ jurisdiction of this court. In this connection see *Saradish Ray v. Municipal Commissioners of Suri*, *Moinuddin v. Divisional Mechanical Engineer, N. R. Ry. and L. H. Sugar Factories & Oil Mills v. State of U. P.* It was, however, contended that no objection in the counter-affidavit was taken to the affidavit filed in support of the petition and, therefore, the petition should not be dismissed on this ground. It is true that the objection as such was not taken, but it is the duty of the petitioner who comes to court to lay a proper and firm foundation on facts on which the petition is based. Relevant facts have to be stated on affidavit from personal knowledge. The facts cannot ordinarily be sworn by a pairakar as on information from the petitioner. The Supreme Court in *State of Bombay v. Purushottam Jog Naik* has laid down that affidavits as far as possible in writ petitions should conform to the provisions of Order XIX, rule 3 of the Civil Procedure Code. That mandate has been neglected in this case. It is immaterial whether the respondent has taken objection thereto or not. It is, primarily, for the court to see whether the writ jurisdiction in favour of such a petitioner will be exercised. The petition would in my judgment stand to be dismissed on this short ground alone.

As, however, other contentions were argued, I would briefly deal with them also.

Section 226 of the Act of 1961 is an improvement upon section 46(5A) of the Act of 1922. These proceedings are in the nature of garnishee proceedings and give the Income Tax Officer the power to issue a notice in writing requiring any person from whom money is due or may become due to the assessee or any person who holds or may subsequently hold money for or on account of the assessee to pay to the Income Tax Officer either forthwith upon the money becoming due or being held or had or within the time specified in the notice so much of the money as is sufficient to pay the amount due by the assessee in respect of the arrears or the whole of the amount when it is equal to or less than that amount. Sub-clause (vi) of clause (3) of section 226 reads :

"Where a person to whom a notice under this sub-section is sent objects to it by a statement on oath that the sum demanded or any part thereof is not due to the assessee or that he does not hold any money for or on account of the assessee, then, nothing contained in this sub-section shall be deemed to require such person to pay any such sum or part thereof, as the case may be, but if it is discovered that such statement was false in any material particular, such person shall be personally liable to the Income Tax Officer to the extent of the assessee's liability for any sum due under this Act, whichever is less."

Then follows sub-clause (x). This reads :

"If the person to whom a notice under this sub-section is sent fails to make payment in pursuance thereof to the Income Tax Officer, he shall be deemed to be an assessee in default in respect of the amount specified in the notice and further proceedings may be taken against him for the realisation of the amount as if it were an arrear of tax due from him, in the manner provided in sections 222 to 225, and the notices shall have the same effect as an attachment of a debt by the Tax Recovery Officer in exercise of his powers u/s 222."

Under sub-clause (vi), in order to test the bona fides of the party against whom a notice has been issued u/s 226(3), a rough and ready procedure has been provided and that is that the objection and denial should be on oath. The time within which such objection should be filed, however, is not specified, but manifestly it must be within the time as given by the Income Tax Officer in the notice in writing issued under sub-section (iii) of section 226 or within a reasonable time thereafter. That denial on oath must, however, be at a time before proceedings under sub-section (x) are taken, i.e., before such person is deemed to be an assessee in default and recovery certificate is sent to the Tax Recovery Officer.

If a statement on oath denying liability has been made at that stage, then there is no alternative for the Income Tax Officer but to stay his hands and not to proceed further. Under sub-clause (x) of section 226, the only remedy of the Income Tax Officer is to try and discover whether the statement made on oath by such person was false in any material particular and, upon such a finding being reached, such person would become personally liable to the Income Tax Officer

as if the liability of the assessee was his as on the date of the notice or to the extent of the assessee's liability for any sum due under this Act, whichever was less.

In the present case the Income Tax Officer would have been well advised to have denied on personal knowledge the allegation of the petitioner that an attempt was made by him to make a statement on oath but such statement was not recorded by the Income Tax Officer. Nevertheless, as the statement was denied "from a parcel of the records" which not only included the proceedings after the notice was issued u/s 226(3) but also all the proceedings thereafter, it cannot be brushed aside, particularly, when the conduct of the petitioner would appear to belie the allegation now made. As already noticed, even in the affidavit dated the 17th March, 1963, which was the first affidavit filed by the petitioner, nor at any stage prior thereto, was any grievance made that his statement on oath was not recorded by the Income Tax Officer. If any such thing had transpired or a right had, in fact, been denied by the Income Tax Officer, the least that one would have expected was a ventilation of that grievance in the correspondence which followed. There is, however, not a whisper about it anywhere till the 17th March, 1964, i.e., more than two months after the recovery certificate had already been sent to the Tax Recovery Officer. This, therefore, clearly is an after thought in order to salvage the case. In these circumstances, the proper stage having passed, it is a matter of considerable doubt whether the Income Tax Officer was bound to stay his hands under the provisions of sub-clause (vi) of section 226(3) of the Act after the recovery certificate had already been issued to the Tax Recovery Officer. Once the recovery certificate is issued, then statutorily the provisions of section 222 to section 225 come into play; section 222 enjoins upon the Recovery Officer upon the receipt of such certificate to proceed to recover the amount specified therein by one or more of the modes mentioned in that sub-section and in accordance with the rules laid down in the Second Schedule. One such rule in the Second Schedule to the Act is rule 2 which provides that when a certificate has been received by the Tax Recovery Officer from the Income Tax Officer for the recovery of arrears under this Schedule, the Tax Recovery Officer shall cause to be served upon the defaulter a notice requiring the defaulter to pay the amount specified in the certificate within 15 days from the date of the service of the notice and in default steps would be taken to realise the amount under this Schedule. No steps in execution of a certificate can be taken until the period of 15 days has lapsed since the date of the service of the notice required by the preceding rule 1.

Section 224 provides that once the certificate has reached the Tax Recovery Officer u/s 222, it shall not be open to the assessee to dispute before the Tax Recovery Officer the correctness of the assessment and "no objection to the certificate on any ground shall be entertained by the Tax Recovery Officer."

Sub-clause (2) gives the Income Tax Officer the valuable power :

"Notwithstanding the issue of a certificate to a Tax Recovery Officer, the Income

Tax Officer shall have power to withdraw or correct any clerical or arithmetical mistake in the certificate by sending an intimation to the Tax Recovery Officer."

Therefore, it would appear that once the proceedings have reached the Tax Recovery Officer u/s 222, as a result of action u/s 226(3)(x) of the Act, then the only way in which the Income Tax Officer can interfere with such certificate is by withdrawing or correcting the recovery certificate under the provisions of section 224(2) of the Act.

The question then arises whether the mere filing of an affidavit at that late stage by a person denying his liability of any debt due to the assessee obliges the Income Tax Officer to forthwith stay his hands or can he, at that stage, insist on his being satisfied that there is a prima facie case for withdrawing or modifying the recovery certificate. It is true that the Income Tax Officer would in a way be determining the rights of a third party who is not an assessee before him vis-a-vis his creditor who may or may not be an assessee, nevertheless, if no valid objection as required by law is taken at the proper time and such person himself is to blame for the consequences which follow, there is no reason to think that the Income Tax Officer would be bound to stay his hands. The Income Tax Officer would, in such circumstances, be entitled to be satisfied prima facie before directing the withdrawal or modification of the recovery certificate. That is precisely what the Income Tax Officer and the Inspecting Assistant Commissioner have been endeavouring to do in these proceedings. They have been calling upon the petitioner to produce his books in order to satisfy themselves as to whether any amount was in fact owed by the petitioner to the assessee. The result may be unfortunate for the petitioner but he himself is to blame for having allowed the grass to grow under his feet and for not having complied with the provisions of section 226(3) within time or the extended time stipulated in the notice u/s 226(3) and before the recovery certificate was sent to the Tax Recovery Officer. I have, however, no doubt that even now if the Income Tax Officer or the Inspecting Assistant Commissioner is satisfied that no debt was due from the petitioner to the assessee, they will withdraw the recovery certificate, but the petitioner has now no longer an inviolate right to insist that the Income Tax Officer must stay his hands under the provisions of section 226(3) of the Act.

The question as to whether the provisions of rules 2 and 3 of Schedule II to the Act are mandatory or merely procedural has caused me some anxiety. It is, however, unnecessary to finally decide this question in these proceedings, as I am satisfied that in this case the petitioner admittedly had knowledge of the demand made against him since January 20, 1964, and the actual attachment was only made on the 22nd of April, 1964. Therefore, even if there was any lacuna in the notice, inasmuch as fifteen days notice for compliance was not specifically given, yet as the petitioner has had much more than the requisite 15 days notice in which to arrange for the payment of the demand made and no prejudice having shown to have been caused, I would decline to exercise the extra-ordinary writ jurisdiction in favour of the petitioner.

There would also appear to be an alternate remedy available in the shape of an appeal under rule 86 of the Second Schedule from the warrant of attachment which was issued, which according to the petitioner was one without having complied with rules 2 and 3 of the Second Schedule. That would be a matter essentially for a court of appeal to go into as it inevitably involves questions of fact.

For the reasons given above, the writ petition is dismissed. In the circumstances of the case, there will be no order as to costs. Petition dismissed.